Goucher College *and* Service Employees International Union, Local 500, Petitioner. Case 05–RC–139478

August 11, 2016

DECISION AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The National Labor Relations Board, by a three-member panel, has considered determinative challenges to ballots cast in a mail-ballot election that commenced November 25, 2014, and the hearing officer's report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The initial tally of ballots showed 33 ballots for and 33 against the Petitioner, with 12 challenged ballots, a number sufficient to affect the results. Five of the challenged ballots remain before the Board for disposition.[2]

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

Background

The parties stipulated to the following bargaining unit:

> All full-time, part-time and half-time, non-tenure and non-tenure track faculty employed by Goucher College to teach at least one credit bearing classes, lessons or labs (including but not limited to Post-Doctoral Teaching Fellows) . . . but excluding all graduate and post graduate faculty and teaching fellows, all faculty in the Welch Graduate Studies Center, all tenure and tenure track faculty, all other employees whether or not they have teaching responsibilities, including but not limited to program directors, department chairs, graduate students, teaching associates, teaching assistants, librarians, registrars, deans, provosts, administrators, coaches, office clerical employees, managers, confidential employees, guards and supervisors as defined by the Act.

The parties further stipulated that employees in the unit employed during the monthly payroll period ending October 24, 2014, were eligible to vote. It is uncontested by the parties that the challenged voters were non-tenure track faculty members, including a Post-Doctoral Teaching Fellow, and were employed on the payroll eligibility date. It is also uncontested that all non-tenure track faculty are employed on short-term contracts of one academic year or less.

The hearing officer analyzed the ballot challenges under the Board's three-prong *Caesars Tahoe* test for resolving determinative challenged ballots in cases involving stipulated bargaining units. *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002).[3] Applying the first prong of *Caesars Tahoe*, the hearing officer recommended overruling the challenge to post-Doctoral Teaching Fellow Madeleine Fairbairn's ballot because the parties unambiguously included her specific classification in the stipulated unit. However, the hearing officer found the stipulation ambiguous as to the inclusion or exclusion of visiting or replacement faculty, including the four remaining challenged voters: Joseph Briggs, Jeffrey Dowd, Daniel Kimball, and Jay Thompson. Evaluating these four challenged ballots under the second prong of *Caesars Tahoe*, the hearing officer concluded that the parties' intentions were "unclear" as to whether they were to be included in or excluded from the unit. The hearing officer then analyzed the challenges to these four ballots under the third prong of *Caesars Tahoe* and determined that all four voters should be included in the unit on community-of-interest grounds.

The Employer argues that all five employees were visiting faculty members or otherwise temporary employees and lacked a community of interest with the other faculty members in the stipulated bargaining unit. Specifically as to Fairbairn, the Employer challenges the hearing officer's conclusion that the inclusion of "Post-Doctoral Teaching Fellows" in the stipulated unit ends the inquiry as to her. Moreover, the Employer argues that the inclusion of non-tenure track faculty in the unit "does not mean that any individual who is a non-tenure track faculty automatically is eligible to vote."

Discussion

The Board's longstanding policy is to permit "parties to stipulate to the appropriateness of the unit, and to various inclusions and exclusions, if the agreement does not violate any express statutory provisions or established

[1] Unchallenged ballots were opened and counted on December 9, 2014.

[2] At the outset of the hearing, the Employer withdrew its challenges to the ballots of employees Chelsea Schields and Maureen Winter. In the absence of exceptions, we adopt the hearing officer's recommendations to sustain the challenges to the ballots of employees Sinan Ozdemir and Michelle Prince and overrule the challenges to the ballots of employees Esther Gibbs, Carol Mills, and Barbara Roswell.

[3] Under *Caesars Tahoe*, the Board first determines whether the stipulation is ambiguous. If not, the Board enforces the stipulation. If it is ambiguous, the Board seeks to determine the parties' intent through standard methods of contract interpretation. If the intent cannot be discerned, the Board determines the bargaining unit by employing its community-of-interest test. 337 NLRB at 1097.

Board policies." *White Cloud Products*, 214 NLRB 516, 517 (1974). We agree with the hearing officer that the parties unambiguously included Fairbairn's specific classification, Post-Doctoral Teaching Fellow, in the stipulated unit and that she was eligible to vote.[4] Unlike the hearing officer, we find that the stipulated election agreement unambiguously includes all non-tenure track faculty members, including Briggs, Dowd, Kimball, and Thompson.[5] The parties could have still intended to exclude Briggs, Dowd, Kimball, and Thompson under the Board's policy of excluding temporary employees who lack a sufficient community of interest with unit employees. However, in the circumstances here, we agree with the hearing officer that the Employer failed to show that Briggs, Dowd, Kimball, and Thompson were temporary employees. Thus, they are also eligible to vote.[6]

The agreement unambiguously includes all part-time "non-tenure and non-tenure track faculty employed by Goucher College." As stated above, the Employer does not dispute that the challenged voters are non-tenure track faculty members. The only issue the Employer raises is whether visiting or replacement non-tenure track faculty members were ineligible to vote because of their alleged temporary employee status. As the party asserting ineligibility, the Employer bears the burden of showing that the challenged voters were ineligible to vote. See *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007). It has not met that burden.

In an academic setting, terminal contract faculty members who are not being rehired after the expiration of their current contracts share a community of interest during their employment with, and are properly included in, an overall faculty bargaining unit. See *Manhattan College*, 195 NLRB 65, 66 (1972); see also *University of Vermont and State Agricultural College*, 223 NLRB 423, 427 (1976) (reaffirming the Board's policy of including terminal contract employees in an overall faculty bargaining unit); *Rensselaer Polytechnic Institute*, 218 NLRB 1435, 1437 (1975) ("[T]he Board has uniformly included [terminal contract faculty] in faculty bargaining units since, while their employment continues, they have a substantial community of interest with their colleagues.").

Like the terminal contract faculty members in these cases, the visiting or replacement faculty members here, who may expect their employment to end on a fixed date, share a community of interest with the overall unit of other non-tenure and non-tenure track faculty members during the term of their employment. In fact, the community of interest among the faculty members in this case is stronger than in *Manhattan College*: as of the payroll eligibility date, the Employer here had not told several of the faculty members whose eligibility it contests whether or not their contracts would be renewed. Until their contracts expire, these visiting or replacement faculty members continue to share an interest in terms and conditions of employment with other faculty members in the bargaining unit. See *Fordham University*, 214 NLRB 971, 975 (1974). Accordingly, we find that the Employer failed to establish that Briggs, Dowd, Kimball, and Thompson should be excluded from the unit as temporary employees who lack a community of interest with the other non-tenure and non-tenure track faculty members in the stipulated bargaining unit.[7]

[4] We find it unnecessary to pass on whether Fairbairn is a temporary employee. The parties clearly intended to include Fairbairn in the stipulated unit. The practice of excluding temporary employees from a unit recognizes that, as a general rule, they are unlikely to share a community of interest with the rest of the unit. *Marian Medical Center*, 339 NLRB 127, 128 (2003). However, "a stipulated inclusion or exclusion which may not coincide with a determination which the Board would make in a nonstipulated unit case on a 'community of interest' basis is not a violation of Board policy such as would justify overriding the stipulation." *White Cloud Products*, 214 NLRB at 517. Hence, even if Fairbairn was a temporary employee, there is no justification under Board law to override the parties' explicit stipulation to include her in the unit.

[5] Our concurring colleague contends that the stipulation is ambiguous as to whether Briggs and Thompson, whose appointment letters refer to their position as "lecturer," are non-tenure track faculty members that the parties clearly intended to include in the unit. However, in describing their position, the appointment letters state that Briggs and Thompson will each teach two classes and also refers to them as "part-time faculty member[s]." In light of this evidence, we think the stipulation, which provides for the inclusion of *all* part-time, non-tenure track faculty members, unambiguously includes their position.

[6] Unlike with Fairbairn, there is no evidence that the parties specifically intended to include Briggs, Dowd, Kimball, and Thompson in the stipulated unit. The parties only stipulated to including their classification: all non-tenure track faculty members. Although Briggs, Dowd, Kimball, and Thompson unambiguously fall under that classification, the Employer indisputably has other non-tenure track faculty members included in the unit who are not temporary employees. Hence, in disagreement with our concurring colleague's application of *Caesars Tahoe*, 337 NLRB at 1097, we find that the parties' intent is not clear from the stipulation, which does not specify whether Briggs, Dowd, Kimball, and Thompson, if they are temporary employees, should be included in the stipulated unit. This is in contrast to *McFarling Foods, Inc*., 336 NLRB 1140, 1140 (2001), cited by our colleague, where the Board found that the parties specifically intended to include the challenged voters in the stipulated unit. Accordingly, the stipulation must be read against a backdrop of established Board policies, one of which is the exclusion of temporary employees who lack a community of interest with the unit employees.

[7] In *Goddard College*, 216 NLRB 457, 458 (1975), the Board found that the visiting faculty members lacked a community of interest with a unit of full-time and part-time faculty, because the visiting employees' work was of a temporary nature and they had no reasonable expectation of reappointment. Here, as in *Manhattan College* and its progeny, we find that the employees at issue share a community of interest with other employees in the unit during their employment that is more significant than whether or not they have a reasonable expectation of

Conclusion

It IS THEREFORE DIRECTED that the Regional Director for Region 5 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Joseph Briggs, Jeffrey Dowd, Madeleine Fairbairn, Esther Gibbs, Daniel Kimball, Carol Mills, Barbara Roswell, Chelsea Schields, Jay Thompson, and Maureen Winter. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. August 11, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

I agree with my colleagues that the ballots of Joseph Briggs, Jeffrey Dowd, Madeleine Fairbairn, Daniel Kimball, and Jay Thompson should be opened and counted. However, I take a different path in reaching this result. The election was conducted pursuant to a stipulated election agreement. The purpose of stipulated election agreements is to streamline the election process by giving effect to the parties' intent regarding the inclusion and exclusion of voters. Here, review of the stipulated election agreement and extrinsic evidence clearly indicates the parties' intent to include these five voters in the unit, and I would give effect to this intent without reaching a community-of-interest analysis, including the employees' alleged temporary status.

The parties stipulated to a bargaining unit of "[a]ll full-time, part-time and half-time, non-tenure and non-tenure track faculty employed by Goucher College to teach at least one credit bearing classes, lessons or labs (including but not limited to Post-Doctoral Teaching Fellows) . . . ." It is uncontested by the parties that the challenged voters were non-tenure track faculty members, including a Post-Doctoral Teaching Fellow, and were employed on the payroll eligibility date.

The Board gives effect to unambiguous stipulations to secure "the speedy resolution of questions concerning representation." *Tribune Co.*, 190 NLRB 398, 398 (1971). Accordingly, "[t]he Board has a longstanding policy of permitting parties to enter into stipulations regarding appropriate bargaining units." *Northwest Community Hospital*, 331 NLRB 307, 307 (2000). Pursuant to this longstanding policy, in a stipulated unit case "'the Board's function is to ascertain the parties' intent with regard to the disputed employee and then to determine whether such intent is inconsistent with any statutory provision or established Board policy.'" *White Cloud Products*, 214 NLRB 516, 516 (1974) (quoting *Tribune Co.*, above). "If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, then the Board will hold the parties to their agreement." *Northwest Community Hospital*, above. Were the Board "to review [the parties'] stipulation *de novo*, and make [its] own findings, [it] would be undercutting the very agreement which served as the basis for conducting the election." *Tribune Co.*, above.

Although a stipulation that is "inconsistent with any statutory provision or established Board policy" will not be enforced, *White Cloud Products*, 214 NLRB at 516, the Board has stated that "a stipulated inclusion or exclusion which may not coincide with a determination which the Board would make in a nonstipulated-unit case on a 'community of interest' basis is not a violation of Board policy such as would justify overriding the stipulation," id. at 517. In this regard, in both *Tribune Co.* and *White Cloud Products* the Board cited with approval the Second Circuit's reasoning in *Tidewater Oil Co v. NLRB*, 358 F.2d 363 (2d Cir. 1966):

> We view community of interest as a doctrine useful in drawing the borders of an appropriate bargaining unit, a function well within the discretion of the Board. But we do not conclude that the doctrine remains as an established Board policy sufficient to override the parties' intent when the Board, in the interests of furthering consent elections, allows the parties to fix the unit.

358 F.2d at 366. In sum, so long as a stipulation is not "inconsistent with any statutory provision or established Board policy," *White Cloud Products*, above at 516, it "is . . . conclusive regarding challenges that are contrary to the stipulation," *Gala Food Processing*, 310 NLRB 1193, 1194 (1993), even if the Board would reach a different result were it to apply a community-of-interest analysis, *White Cloud Products*, above at 517.

reappointment. Nonetheless, we note that the Employer in this case did not show that Briggs, Dowd, Kimball, and Thompson lacked a reasonable expectation of continued employment. The Employer had personally informed some of them that their contracts might be renewed and had previously renewed other visiting or replacement faculty members' contracts.

The Board reiterated its approach to resolving determinative challenged ballots in stipulated unit elections in *Caesars Tahoe*, 337 NLRB at 1096. The Board cited with approval the standard set forth by the United States Court of Appeals for the D.C. Circuit in *Associated Milk Producers v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999). Observing that this standard "embodied" the Board's longstanding approach in stipulated unit cases, the Board adopted the D.C. Circuit's standard "as a clear statement of the analytical approach to be followed prospectively in stipulated unit cases." *Caesars Tahoe*, above at 1097. The Board restated this analytical approach as follows:

> [T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Id.

Because this is a stipulated unit election, *Caesars Tahoe* is the appropriate standard to apply to resolve whether challenged voters are included in the stipulated unit. I agree with my colleagues that Fairbairn's position as a Post-Doctoral Teaching Fellow was unambiguously included within the stipulated unit. I also find, as do my colleagues, that Dowd's and Kimball's positions were unambiguously included in the stipulated unit. Again, the parties stipulated to a bargaining unit that relevantly included "[a]ll full-time, part-time and half-time, non-tenure and non-tenure track faculty." Dowd's and Kimball's appointment letters indicated that each received a "full-time, non-tenure-track appointment."

The stipulation is, however, ambiguous with regard to Briggs and Thompson. Their letters of appointment indicate that they were employed as part-time lecturers, a position not mentioned in the stipulation. However, the parties' intent may be determined at the second step of the *Caesars Tahoe* analysis by examining extrinsic evidence. The Employer's Faculty Handbook states, "All part-time faculty are considered to be non-tenure-track faculty . . . ." Thus, as part-time lecturers, Briggs and Thompson were part-time, non–tenure track faculty. Based on the language of the stipulation as further clarified by the Faculty Handbook, I find that the parties clearly intended to include Briggs and Thompson in the stipulated unit.

The Employer maintains that all five challenged voters are ineligible because they lack a community of interest with the voters in the stipulated bargaining unit due to their temporary status. Specifically as to Fairbairn, the Employer challenges the hearing officer's conclusion that the inclusion of "Post-Doctoral Teaching Fellows" in the stipulated unit ends the inquiry as to her. Moreover, the Employer contends that even though the unit description explicitly includes non-tenure track faculty, "that does not mean that any individual who is a non-tenure track faculty automatically is eligible to vote." I view the Employer's argument as to both Fairbairn and the other challenged voters as faulty on two grounds.

First, unit inclusion and voting eligibility are coterminous concepts. It is the Board's policy "to grant all employees included in the appropriate unit the privilege of voting in the election." *Sears Roebuck & Co.*, 112 NLRB 559, 569 fn. 28 (1955); see also *Gala Food Processing*, 310 NLRB at 1194 fn. 7 ("Unit inclusion and voter eligibility are, of course, inseparable.").

Second, *Caesars Tahoe* eliminates the need to reach the question of the challenged voters' alleged temporary status. The exclusion of an employee from a bargaining unit due to his or her temporary status is based on community-of-interest principles. See *Marian Medical Center*, 339 NLRB 127, 128 (2003) (temporary employee analysis focuses on "the critical nexus between an employee's temporary tenure and the determination whether he shares a community of interest with the unit employees"); *St. Thomas-St. John Cable TV*, 309 NLRB 712, 712 (1992) (finding that challenged voter was a "temporary employee who lacked a sufficient community of interest with unit employees to be an eligible voter"); *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982) (finding challenged voter "to be a temporary employee who does not share a community of interest with any of the unit employees"). Under *Caesars Tahoe*, however, where the parties' intent is clear from the unambiguous terms of the stipulation, or where the stipulation is ambiguous but the parties' intent may be determined through normal methods of contract interpretation, including the examination of extrinsic evidence, a community-of-interest analysis is not reached. 337 NLRB at 1097.[1]

[1] To the extent the Board has considered temporary employee status in stipulated unit elections, these cases predate *Caesars Tahoe*, where the Board held that a community-of-interest analysis will not be reached where the parties' intent may be ascertained from the stipulation itself. See *St. Thomas-St. John Cable TV*, above at 712 (failing to analyze stipulation before finding challenged employee "lacked a sufficient community of interest with unit employees to be an eligible voter"); *Pen Mar Packaging*, above at 874 (failing to analyze stipulation

Declining to reach "temporary employee" status in a stipulated election where the parties' intentions are clear is consistent with the Board's refusal to apply a "dual function" analysis in similar circumstances. As the Board recognized in *Halsted Communications*, since a "dual-function analysis is a variant of the community-of-interest test, . . . it is not applied where the parties' intent to exclude the classification is clear." 347 NLRB 225, 226 (2006); see also *Peirce-Phelps, Inc*., 341 NLRB 585, 585–586 (2004) (declining to reach dual-function analysis where stipulation clearly excluded disputed employee); *Bell Convalescent Hospital*, 337 NLRB 191 (2001) (same). Similarly, the Board has enforced a clear stipulation to include part-time employees without regard to community-of-interest principles. *McFarling Foods, Inc*., 336 NLRB 1140 (2001). I find that the parties' clear intentions must be enforced without regard to the community-of-interest principles reflected in a temporary employee analysis.[2]

In sum, the stipulation unambiguously includes Fairbairn, Dowd, and Kimball in the bargaining unit, and the parties' intent to include Briggs and Thompson is equally clear from considering the stipulation in light of extrinsic evidence. Since that intent does not violate any statutory provision or established Board policy, I would enforce it without reaching the question of whether the challenged voters were temporary.

Accordingly, for the above reasons, I concur.

Dated, Washington, D.C. August 11, 2016

Philip A. Miscimarra, Member

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before finding challenged voter was a temporary employee who did not share a community of interest with unit employees).

[2] The Board will give effect to the parties' intent unless it is "inconsistent with any statutory provision or established Board policy." *Bell Convalescent Hospital*, 337 NLRB at 191. While the Board has at times referred to a "policy" of excluding temporary employees from voting eligibility, see, e.g., *Pen-Mar Packaging*, 261 NLRB at 874, that "policy" is based on community-of-interest principles. Accordingly, the inclusion of temporary employees in a stipulated unit "is not a violation of Board policy such as would justify overriding the stipulation." *White Cloud Products*, 214 NLRB at 517; accord *Tidewater Oil Co. v. NLRB*, 358 F.2d at 366 ("[C]ommunity of interest . . . . [is not] an established Board policy sufficient to override the parties' intent when the Board, in the interests of furthering consent elections, allows the parties to fix the unit.").